United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1751

B P/S

To be argued by
GEORGE I. JANOW

United States Court of Appeals

For the Second Circuit

NARROWS PROMOTIONS, LTD. d/b/a ELITE DELI,
Plaintiff-Appellant,

—against—

HARTFORD INSURANCE COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE, HARTFORD INSURANCE COMPANY

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Counter-Statement of Issue Presented

The sole proposition for determination by this Court treats with the proof establishing the cancellation of the policy through the mail by the defendant.

Counter-Statement of Proceedings Below

This is a suit upon a policy of insurance issued by defendant, Hartford Insurance Company (Hartford), in favor of plaintiff, Narrows Promotions, Ltd., d/b/a Elite Deli, arising out of a fire occurring October 24, 1971. Defendant denied liability on the ground that the policy sued upon had been cancelled prior to the fire. Plaintiff commenced an action against defendant in the Supreme Court of the State of New York, County of Richmond, and the action was duly removed by defendant to the United

States District Court, Eastern District of New York, based upon diversity of citizenship. (9a-15a)*.

Sitting without a jury, Judge Bartels tried the issue of cancellation and thereafter dismissed the complaint on the merits on the ground that the policy "was properly and legally cancelled prior to October 24, 1971, the date of the fire which destroyed the premises occupied by plaintiff doing business as Elite Deli." (250a)

Counter-Statement of the Case

The testimony upon trial showed that plaintiff has been engaged in the delicatessen business located at 2100 Richmond Road, Staten Island (42a-43a). The defendant covered plaintiff's business against fire, among other perils, under policy no. 17 AMP101960 for a period of three years commencing July 25, 1970 in the principal amount of $96,000 (39a; Plff's. Exh. 1, pp. 1-10, EB)**. The broker on the line was John L. Piazza but shortly thereafter, and on December 1, 1970, Piazza's brokerage business was sold to Charles D. Benway and the latter continued as plaintiff's broker on the line. The original broker, John L. Piazza, now is acting as counsel for plaintiff on this appeal, *pro hac vice.*

The policy provided with respect to cancellation by Hartford that

> "This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata

* Numerical reference in parentheses refers to pages in Joint Appendix.

** EB refers to Exhibits Book.

> premium for the expired time, which excess, if not tendered, shall be refunded on demand" (Plff's. Exh. 1, p. 2, lines 60-65, EB; see, also, Sec. 168 Ins. Law).

It is conceded that the words "five days" in the above cancellation clause were deleted and the words "ten days" substituted therefor (240 a; p. 5, Applt's Brief).

Plaintiff chose to finance the premium as it had done in the past. To that end, it executed the "Premium Finance Note and Agreement" which stipulated that the first year's premium of $2,769, less down payment of $553.80 and finance charge of $73.86 or $2,289.06, shall be payable in nine monthly installments of $254.34 each commencing August 25, 1970 (43a-50a; Deft's. Exh. A, pp. 11-13 EB). The agreement provided in "Conditions" that

> "On default in payment of any payment . . . the unpaid balance of the indebtedness evidenced hereby shall become immediately due and payable without notice on demand. Such default . . . shall result in the cancellation of said policy or policies."

The premium was financed through the Chemical Bank, which furnished plaintiff with a coupon book. All installment payments thereafter were paid to the bank (44a-45a; 55a-56a).

With respect to the ninth payment, due April 25, 1971, plaintiff was notified in writing by the Chemical Bank that "According to our records, the amount shown below (i.e. $254.34) is now past due". A copy of said notice was sent to defendant (81a-87a; Deft's Exh. F, p. 21, EB).

Upon receipt of copy of default notice, Hartford undertook the following to cancel the policy for non-payment of premium:

(1)

The First Cancellation Notice dated May 17, 1971, effective June 1, 1971

Upon receipt of the default notice by defendant from the Chemical Bank, Anna Rossi, in charge of defendant's premium financing department (79a) at 123 William Street, New York City (81a), pulled plaintiff's file and gave it to Theresa Moran, typist, with instructions to send out the cancellation notice (82a).

Miss Moran testified that, in the regular course of business (110a-111a), she typed Deft's Exh. A (95a) saying, "that was my job in 1971 . . . I was the only one typing" (104a). Deft's Exh. A is a four page carbon snap-apart form which permits four separate sheets of paper to be typed at one time (95a; 98a). The information typed on the notices came from the details contained in Deft's Exh. A (97a-98a). It will be observed that the name and address of the original insurance broker-lawyer, John L. Piazza, also was typed in. The original notice to plaintiff was placed by Miss Moran in a right-hand window envelope similar to Deft's Exh. G, p. 22, EB; one copy was sent to Mr. Piazza; and the other two copies were placed on file (95a-98a).

The next step, Miss Moran testified, was to type the postal manifest or, as referred to, the manifold (Deft's. Exh. H, p. 24, EB; 98a-99a). This exhibit contained seventeen (17) names and addresses, including plaintiff's on line 4 (99a-100a), and the number on the left hand side on line 4 corresponded to the number of the premium finance agreement which plaintiff originally executed (105a-106a).

> "Q. Do you do any checking of names and addresses as they appear through the window envelope

and the agreement from the financing of the premium? A. (by Miss Moran) I do. I typed it on the manifold." (98a)

Miss Moran then wrapped the manifold around the envelopes and secured it with a rubber band, all of which she left in front of her desk until the mail boy picked it up (100a-101a).

"Q. You see the boy pick it up? A. (by Miss Moran) Yes.

"Q. Did you do that on the 17th day of May, 1971? A. Yes" (101a).

The mail boy subsequently returned the manifold which had been stamped by the post-office, and the cancelled manifold was placed in a loose leaf binder book (101a).

Thomas Thompson, supervisor in defendant's mailing department, testified that he had been employed by defendant for the past seven years and particularly worked in defendant's mail department in 1971 (114a). He further testified that in May, 1971 the system or practice was to have the mail clerk pick up the mail from Mrs. Moran's desk or hand and bring it to the mail department. The mail clerk then would take the rubber band off the manifold and individually count the number of letters and the number of letters listed on the manifold in order to make sure the numbers corresponded. Altogether there were 17 pieces of mail and such number was recorded in the lower left-hand corner of the manifold (114a-116a).

The mail clerk then would put each envelope through the metered postage machine. Since there were 17 letters, he multiplied 17 x 5¢ postage per letter, or 85¢, and then would put the manifold through the meter in order to stamp 85¢ on the upper right hand corner of the manifold (117a).

When metering was finished, the mail boy wrapped the stamped manifold around the 17 letters, which included Deft's. Exh. H, put the rubber band back, and hand-delivered it with other mail to the post office at Church Street in a valise (117a). At the post-office, the postal clerk in his presence would count the envelopes and the number of pieces typed on the manifold and mark number "17" in the box in the lower left-hand side reading: "*Total Number of Pieces Received at Post Office*" and, in the adjacent box, add his initials (118a). The mail boy then would return the receipted, stamped manifold to the premium finance department (119a).

Judge Bartels summarized Thompson's testimony, as above set forth, (120a) and inquired:

> "Is that your testimony?
>
> "The Witness: Yes sir.
>
> "The Court: Is that the regular course of business for the Hartford Insurance Company in the mail department.
>
> "The Witness: For this particular type of system.
>
> "The Court: What do you mean?
>
> "The Witness: This would be a special handling.
>
> "The Court: This is called 'special handling'?
>
> "The Witness: I am saying, it is handled special rather than regular first class.
>
> "The Court: This is a regular course of business as far as mailing these cancellation notices are concerned?
>
> "The Witness: Yes sir.
>
> "The Court: You do that regularly each day for that purpose? You pick it up? That's how the mail is handled?

"The Witness: Yes sir.

"The Court: That is how that particular mail is handled?

"The Witness: Yes sir. (120a-121a).

The cancellation notice never was returned to defendant (145a).

(2)

The Second Cancellation Notice dated July 13, 1971, effective 35 days after receipt or notice or August 18, 1971

The reason a second cancellation notice was issued was because the first notice of cancellation was not sent to the mortgagee, First National City Bank, named in the policy. The second notice was issued to cure such omission (227a).

Rose Vierno, an 11 year employee and supervisor of the policy writing department in defendant's Brooklyn office, 175 Remsen Street, testified that cancellation notices are typed in her department (126a), that she received a Cancellation Worksheet, otherwise referred to as a Scratch sheet, together with the daily, or copy of the policy, from the underwriter with instructions to cancel the policy (130a-133a; Deft's. Exh. I, p. 26, EB).

"The Court: And this is the regular procedure to follow?

"The Witness (Mrs. Vierno): Yes.

"The Court: And in the regular course of business you do this?

"The Witness: Yes.

"The Court: You do it almost every day?

"The Witness: Yes." (132a)

The typist then, July 13, 1971, prepared the cancellation notice (133a) on form 2298, the proper form for an

SM policy, such as used in this case (130a). From the information in the policy, the typist records on form 2298 the policy number, name of insured, name of mortgagee, producer's (or broker's) name and address and code number (133a; 135a-136a). The typing is done on a set of five forms plus two postal receipts similar to the sample marked Deft's. Exh. J, pp. 27-34, EB. (136a-139a). The typist also types in that the cancellation notice is a 35-day recall notice, meaning that the defendant wants the policy back for non-payment of premium (135a).

After the typing job is finished, Mrs. Vierno hands the typed set of five forms to the assembler who checks the pertinent data and then makes a distribution of the notices to the insured, mortgagee, producer, and the balance to file. The assembler then folds the insured's copy and puts it into a right-hand window envelope with the name "showing out" and a copy of the postal receipt or certificate of mailing clipped to the envelope. The assembler does the same to the notice, envelope, and certificate of mailing addressed to the named mortgagee. Only the insured and named mortgagee "get the mailing certificate". The broker does not. His copy is mailed separately (139a-140a). The insured's and mortgagee's letters, with the clipped certificates of mailing, are not put in with the regular mail. They are put aside in a separate place and in a separate pile "so they don't get mixed up and the postal receipt does not fall off until the mail boy comes up." (140a-141a) When the mail clerk arrives, it is turned over to him (141a).

The mail clerk takes the two letters addressed to the insured and named mortgagee to the post-office where the post-office clerk stamps the certificates of mailing (Deft's Exhs. K and L, pp. 35, 36, EB). For each certificate,

defendant pays 5c in addition to the regular postage placed on each envelope (142a-143a).

Defendant never received back the cancellation notice mailed to plaintiff and mortgagee (144a-145a).

R[illegible]ld Boyle, an 11 year employee and supervisor of defendant's mail and supply department at 175 Remsen Street, Brooklyn, testified that he knew the routine and practice of handling mail and taking it to the post-office where notices of cancellation are involved (152a-153a). He testified that the envelopes containing the notices of cancellation and attached certificates of mailing are picked up at the policy writing department (153a). They are then brought to the mail room where, prior to going to the post-office, "we match up each mailing slip with the envelope . . . to make sure the addressee is the same and then we affix five cents postage on each mailing slip or certificate of mailing". Continuing, Boyle testified that the envelope is metered at eight cents, or the going rate at the time, and the certificate of mailing for five cents (154a). At the post-office, the clerk checks the envelopes and certificates to see if it has stamps or metering on it before he stamps the certificate of mailing (155a). Thereafter, the stamped 5c certificate of mailing is returned to the policy writing department.

> "The Court: Was that the regular course of business?
>
> "The Witness: Yes.
>
> "The Court: You did that in the regular course of business?
>
> "The Witness: Yes." (156a)

On cross-examination, Boyle testified that the letters containing cancellation notices and certificates of mailing are separated in the mail room, matched and put through the meter separately, and they come out in the same se-

quence (158a-159a). They are then rubber-banded in separate bundles and the two bundles are taken to the post-office (159a).

"The Court: The certificate of mailing, how do you allocate those to any particular groups of envelopes?

"The Witness: They are separate from all the mail.

"The Court: One bundle and then another so someone has to check them back after the post office. It can't be stamped unless he looks at the address on a particular envelope?

"The Witness: He is certifying that he received that particular mail addressed to that particular mail or envelope.

"Mr. Kaplan: Objection to the question of the Court and the answer.

"The Court: Overruled. Have you taken them over there?

"The Witness: Yes.

"The Court: Have you seen the man look at the envelopes and match them up?

"The Witness: He looks at both but he is reading. I can't tell. I have seen him look at both. I don't know if he is checking the address, postage, or what he is checking.

"The Court: I would think if what you say is true, then he would have to mull through the certificate of mailing to find out what particular envelope it matches up with unless they are in some type of order.

"The Witness: They are in the same sequence as I put them in the machine.

"The Court: How about the certificates?

"The Witness: They are too. If the postage envelope comes up with a particular envelope or receipt that doesn't have the required postage on it, I get both items back.

"The Court: Therefore, it is allocated right then and there.

"The Witness: Right. He will not stamp the receipt—

"The Court: Let's get back to the first statement.

"Are the mailing certificates in the same sequence as the envelopes are metered.

"The Witness: Yes.

"The Court: I got the impression it would be reverse sequence.

"The Witness: No. The one on the bottom goes through the machine and comes out on the receiving tray on the other end, on the bottom.

"The Court: So, the receipts should be in the same sequence and when they go to the post office they are in the same sequence."

(3)

The Third Cancellation Notice

The third cancellation notice was a copy of the second cancellation notice sent to plaintiff by its producer or broker, Charles Benway Insurance Company.

Betsy Motola testified that she was employed by the Charles Benway Agency, Staten Island in 1971 and in charge of personal lines on fire, homeowners, and package insurance (177a-178a); that Mr. Benway took over Mr. Piazza's business, including plaintiff's policy, on or about December 1, 1970 (179a), and that on July 14 or 15, 1971

she receievd a copy of the recall notice (Deft's Exh. K) sent by defendant to plaintiff (182a; 184a).

Mrs. Motola then phoned Elite Deli and asked to speak with Robert DeFranco (last name incorrectly referred to in the Joint Appendix as DeFrancel) but was told he was not in (184a). She called back a few days later and again DeFranco was unavailable. She then wrote a letter to Elite Deli, 2100 Richmond Road, Staten Island, to the attention of Joseph DeFranco and enlosed a photostat copy of the second notice of cancellation, effective August 18, 1971 (185a-186a; Deft's. Exh. N, p. 38, EB). The reason why she addressed the letter to "Joseph", not "Robert", was because she was told by a clerk in her telephone conversation with Elite Deli that "Robert DeFranco was not available and to address any letter to Mr. Joseph DeFranco at Elite Deli" (187a). It was conceded by Robert DeFranco in open court that there was no Joseph DeFranco (188a).

Mrs. Motola never got the letter back nor did Robert DeFranco return her calls (188a-189a).

On cross-examination, Mrs. Motola testified she personally typed the letter and envelope and inserted the photostat copy of the defendant's notice of cancellation in the envelope (190a). After typing and sealing the envelope, she put a stamp on it and put it out with the office mail. Mr. Benway generally takes the mail to the post office although on occasion she does. Mrs. Motola did not know if Mr. Benway or she took the letter to the post office (191a).

> "The Court: Is it the regular course of business for you to put the mail in the envelope and address it and stamp it and put it aside for someone to pick it up and take it to the post office?

"The Court: You did this in the regular course of business and it was the regular course of business for it to be done in your office—that was regular procedure?

"The Witness: Yes." (192a-193a).

Mrs. Motola's file showed that on February 2, 1971 Charles Benway Agency advised plaintiff that they took over Piazza's Agency (196a).

Charles Benway testified that for the past 16 years he has been an independent insurance agent, that he purchased the Piazza Agency on or about December 1, 1970, which included policy No. SM101960 issued to plaintiff (202a; 205a). The first time he personally met Robert DeFranco was the morning after the fire, i.e., October 25, 1971. The meeting was at Benway's office in response to a telephone call from DeFranco (204a).

Benway further testified that he received the copy of the second notice of cancellation (Deft's Exh. M, p. 37, EB) after July 13, 1971 (206a). He then instructed Mrs. Motola or dictated a letter to her after she was unable to reach DeFranco by phone (207a).

Benway brings the mail to the post office "maybe 99 percent of the time". All the mail leaves his office after 5 o'clock in two bundles, one containing local mail, the other out-of-town mail. He places them on his car seat and drives to the Manor Road post office in Staten Island and brings them in to the post office (207a-208a).

On October 25, 1970, after the fire, DeFranco came to Benway's office with an independent adjuster (209a).

Benway pulled out plaintiff's folder, the outside of which was marked "cancelled". Benway told DeFranco the policy was cancelled and said "Take a look at that" and DeFranco replied, "I never got that". Benway said: "We tried to call you twice and wrote you a letter". DeFranco said he never got that either and he followed Benway into his office; the independent adjuster stayed outside. Then DeFranco said: "Can we do anything?" and Benway told DeFranco that there is nothing he can do if the defendant received the cancellation notice. DeFranco said, "Mr. Piazza always took care of me." (210a-211a).

Benway then told DeFranco it was important that he get insurance. Benway then photostated the policy and Defts. Exh. L&M and gave them to him (211a-212a). Benway also had handled a beer bond for plaintiff. Since plaintiff did not pay the previous year's bond premium, Benway advanced the premium (214a) and wrote to DeFranco on May 17, 1971 for reimbursement, enclosing an application form for such bond (Defts. Exh. O, p. 39, EB). DeFranco returned the executed application (Deft's Exh. p. 39, EB) with a check to reimburse Benway for the premium advanced by him (215a-218a).

On cross-examination, Benway testified that when DeFranco phoned him in his home on October 25, 1971 he told DeFranco "right then and there" that "I thought the policy was cancelled". Benway further testified, in response to Judge Bartels' inquiries, that he billed DeFranco on June 1, 1971 for the second year installment but he never received "a check, phone calls or reply whatsoever" (221a).

(4)

Statement of Final Balance of $254.34 mailed to plaintiff (Deft's. Exh. C, p. 17, EB)

(5)

Final Notice Mailed to Plaintiff (Deft's. Exh. D, p. 19, EB)

DeFranco's Testimony

Robert DeFranco was called to testify by defendant. He never took the stand in his own behalf or on rebuttal. The relevant parts of testimony are as follows:

(a)

As to the first notice of cancellation (Deft's. Exh. B, p. 15, EB):

"Q. I show you a paper and ask you, whether you received this paper from the Hartford?

(Document shown to witness)

"A. I can't recall it right now" (52a).

(b)

As to the second notice of cancellation (See, Deft's. Exh. K, p. 35, EB):

"A. Never got a cancellation notice." (65a)

(c)

As to the third notice of cancellation (Deft's. Exh. N, p. 38, EB):

"Q. Mr. DeFranco, did you ever get a letter in the month of July 1971, more particularly, July 27, 1971 from the Charles Benway Agency?

* * *

"The Court: Did you ever get any letters from him at any time?

"The Witness: I can't recall it right now, no." (67a).

(d)

As to Statement of Final Balance (Defts. Exh. C, p. 17, EB):

"Q. Did you ever get the original of that paper which I show you? "A. I assume I got this here but I don't recall today. It is three years. I got a lot of papers between now and three years—

"Q. Through the mail, did you get the papers? "A. Through the mail—however you want to call it but I don't keep a file with me." (54a)

(e)

As to Final Notice (Deft's. Exh. D, p. 18, EB):

"Q. After this notice marked defendants' exhibit C in evidence, did you get this letter from the Hartford dated October 12, 1971?

(Document shown to witness)

"A. I assume I did but then don't recollect me now.

"Q. You assume you did? "A. I can't remember a three year letter now.

"Q. Either you did or didn't. "A. I can't remember three years ago. It was addressed to me. I assume I did." (60a-61a).

POINT I

The reason for the cancellation is immaterial since Hartford, by policy terms, had an absolute right of cancellation.

The cancellation clause in the policy sued upon, as amended, provided that it may be cancelled at any time by

the Company by giving to the insured a ten (10) day written cancellation notice.

It has been held that such right of cancellation may be exercised by the Company regardless of the reason, motive, or cause (*BX Corp.* v. *Aetna Ins. Co.*, 187 Misc. 806, affd. 272 A.D. 880, app. den. 272 A.D. 961; *International Life Ins. & Trust Co.* v. *Franklin Fire & Trust Co.*, 66 N.Y. 119, 122; *6a Appelman, Ins. Law & Prac.* p. 521).

It is, therefore, immaterial in this case whether the policy was cancelled for non-payment of premium or recalled as noted on the second cancellation notice (Defts. Exh. K, p. 35, EB).

Upon trial, Robert DeFranco, testifying for plaintiff, swore that he had paid all the installments including the ninth and last installment due April 25, 1971 (43a; 49a) to the Chemical Bank (49a-50a) which financed the premium (80a-81a). The checks, he testified, were burned in the fire and, therefore, unavailable (46a). Judge Bartels correctly pointed out that the question of making payments was between Chemical Bank and plaintiff, and, if payment had been made, the bank's records would show that (59a). The Chemical Bank, however, never was called as a witness by plaintiff and, therefore, it can be assumed that Chemical Bank was not paid. Pointing out that defendant stated it was not paid and the evidence showed Chemical was not paid (223a), Judge Bartels rightfully concluded that

> "It seems to me from the testimony introduced here that it is very clear that this man did not pay the installments due on the policy. Now, we are playing games if we are trying to indicate that maybe he did." (226a)

In this Court, the contention that the ninth and last installment was paid is not urged. Instead, plaintiff argues that defendant is equitably estopped from claiming that the policy was cancelled because there was a pro rata rebate due it of $200.84 (Point V, Applt's. Brief). This point never was raised upon trial. Be that as it may, plaintiff's argument is based upon an erroneous assumption that the policy was in force for 305 days or, from inception date, July 25, 1970, to October 12, 1971, the date of the final notice (Deft. Exh. D, p. 18, EB) and, therefore, it is entitled to a pro rata return of $200.84.

Such argument overlooks the fact that the policy was issued on an installment basis and the ninth and last installment of $254.34 was due April 25, 1971. For the failure to pay such installment, the policy was cancelled. Nor does the arithmetic of the transaction support plaintiff's contention. Plaintiff owed $2,769 (first year premium) plus $73.86 (finance charge), or $2,842.86. It paid eight installments of $254.34, or $2,034.72 plus deposit of $553.80, or $2,588.52. The difference between $2,588.52 and $2,842.86 is $254.34, the only amount due and owing from plaintiff.

Assuming, arguendo, that the policy was cancelled on October 12, 1971, or 305 days after inception, then, and in such event, the policy would not have been in existence on October 24, 1971, date of fire. And if, as claimed, there was also due a return premium of $200.84, plaintiff would be entitled to it on demand as provided by policy condition.

It is submitted, therefore, that the policy was cancelled on August 18, 1971, as claimed by defendant, or on October 12, 1971, as claimed by plaintiff, both dates being *prior* to the fire. In either event, since the policy was terminated prior to the fire, it is submitted that this Court need go no further in affirming the judgment below.

POINT II

Defendant's proof overwhelmingly established by detailed evidence the requisite facts necessary to establish actual notice of cancellation.

In the case at bar, defendant issued a second notice of cancellation because in the opinion of its underwriter this was necessary as the first notice omitted the named mortgagee. Although no particular form of notice is necessary, any notice conveying an intention to cancel is effective (*Johnson* v. *Nationwide Mutual Insurance Co.*, 276 F. 2d 574).

Plaintiff could not have been left in doubt as to the expiration date of the policy or defendant's intention to cancel. The notice of July 13, 1971 was mailed July 14, 1971 (160a) effective 35 days after receipt. As a matter of simple arithmetic, the policy would have expired August 18, 1971, or 67 days prior to the fire.

We submit that the notice of cancellation was clear, unconditional, and unequivocal (*Van Tassel* v. *Greenwich Insurance Co.*, 151 N.Y. 130) so as to produce in plaintiff's mind no doubt of the fact of cancellation and termination of the contract of insurance (*6a Appelman, Ins. Law & Prac.* p. 598).

Upon trial, defendant presented competent proof of its office practice and procedure followed in the regular course of business for processing the second notice of cancellation.

In *Gardam & Son* v. *Batterson*, 198 N.Y. 175, 178, where the question presented was whether a letter was sent by mail at a certain time, the Court held that only in the absence of any evidence as to its being *deposited* with the Post Office authorities, that proof of the existence of a course of business, or of office practice is required, according to which, the letter naturally would have been so deposited.

Proof of deposit of the second notice of cancellation in the post office in this case was evidenced by the receipted certificate of mailing marked Deft's Exh. L, p. 36, EB. In addition, there was separate independent proof by the witnesses Vierno and Boyle amply qualified by their testimony as to records and writings made in the defendant's business or of office practice according to when the second notice of cancellation was naturally so deposited.

Rose Vierno, supervisor of the policy writing department, testified that she received a Cancellation Worksheet or Scratch sheet, together with the daily or copy policy, from the underwriter with instructions to cancel the policy because it had been "cancelled by premium finance". The typist, using a set of five forms plus two postal receipts, all similar to the sample marked Deft's. Exh. J, pp. 27-34, EB, typed in the pertinent data taken from the daily, which included policy number, name and address of insured (upper right hand corner), name and address of named mortgagee (lower left hand corner), producer (or broker's) name and address and code number, all as set forth in Deft's. Exhs. K to M, pp. 35-37, EB.

When the typing job was finished, Mrs. Vierno handed the typed set to the assembler who first checked the perteinent data and then distributed the notices to the insured, named mortgagee, producer or broker, and the balance to file. The assembler folded the insured's copy and put it into a right-hand window envelope with the name of the insured and address "showing out" and a copy of the postal receipt, entitled "certificate of mailing", clipped to the envelope. The same procedure was followed with respect to the named mortgagee except, of course, the latter's copy was placed in a left-hand window envelope. (The producer's copy was sent by regular mail). The insured's and mortgagee's notices of cancellation, to each of which there was allotted a separate certificate of mailing, were not put

out with the regular mail. They were put in a separate place and in a separate file to be turned over to the mail boy.

Ronald Boyle, supervisor of defendant's mail and supply department, testified that the letters containing cancellation notices and certificates of mailing are, upon arrival in the mail room, separated, matched up, and separately put through the postage meter. The letters are metered at 8c, or the going rate at the time, and the certificates of mailing are metered at 5c. The letters and certificates come out of the meter in the same sequence that they are put in and separate rubber-banded bundles are made of the letters and certificates and taken to the post office by the mail boy for posting, all in the regular course of business.

At the post office, the clerk takes the two bundles, each of which has been matched up and metered, and allocates each letter to each certificate. He scrutinizes them and marks the certificate with a stamp of the United States Government which he returns to the mail boy. The mail boy delivers the receipted certificate to the policy writing department.

The outstanding fact in this case is that the second notice of cancellation was delivered to the post office for deposit as evidenced by the receipted certificate of mailing (Deft's. Exh. L). Such certificate is similar to Form 3817 in use by the United States Post Office. Obviously, to obtain the postmaster's receipt requires personal delivery of the letter containing the notice of cancellation to the post office. The receipted certificate is the best evidence that defendant actually delivered the notice of cancellation to the post office for mailing. In *Mehr & Commark, Principles of Insurance* (4th Ed.), it was stated at p. 188:

> "The use of first class mail with the postmaster's receipt (Form 3817) should be ample proof that the notice was sent."

And, since the notice of cancellation was sent, the law presumes that the notice was delivered (*Boyce* v. *National Commercial Bank and Trust of Albany*, 41 Misc. 2d 1071, aff'd. 22 A.D. 2d 848). As was said in *Boyce:*

> "There is a presumption in the law that a letter properly addressed, stamped and mailed is duly delivered to the addressee (*Trusts & Guarantee Co.* v. *Barnhardt*, 270 N.Y. 350); *Sasmor* v. *Vivandau, Inc.*, 200 Misc. 1020; *New York Central Emp. Albany Dist. Federal Credit Union No. 5119* v. *Commercial Credit Co. of Newark*, 13 Misc. 2d 874)." (p. 275)

In the case at bar, the defendant never received back from the post office the notices mailed to the insured and mortgagee and, in view thereof, a trial judge could properly conclude that delivery was duly made.

A mere denial of receipt of the notice of cancellation, such as was made by the witness DeFranco in this case, does not overcome the presumption. That principle was enunciated in *N.Y. Central Union* v. *Commercial Credit Co.*, 13 Misc. 2d 874-5:

> "Plaintiff's employees would testify, if called, that plaintiff's records do not show receipt of such notice and would deny having received the same. It has been held that the mere denial of receipt does not create an issue of fact. It is a general rule that a letter, properly addressed, stamped, and mailed is duly delivered to the addressee (*Trusts & Guarantee Co.* v. *Barnhardt*, 270 N.Y. 350; Sasmor v. Vivandau, Inc., 200 Misc. 1020, 1024)."

The expiration date of the second notice was forcibly brought to plaintiff's attention by its own broker who, independent of Hartford, advised by letter dated July 27, 1971 that the policy was cancelled "effective August 18, 1971 at 12:01 A.M.: (Deft's. Exh. N, p. 38 EB). Betsy Motola of the Charles Benway Insurance Agency testified that she received from Hartford a copy of the notice, that she sought unsuccessfully to speak with DeFranco by telephone, that she typed the letter of July 27, 1971, that she enclosed the letter and notice in an envelope addressed to "Mr. Joseph DeFranco, Elite Deli, 2100 Richmond Road, Staten Island, New York" and sealed and stamped the letter. Benway testified that he deposited the letter as part of their usual practice (which is "99 percent of the time" (207a)) in the main post office.

Though the name "Joseph", instead of "Robert", DeFranco appeared on the envelope, that is immaterial because there is no Joseph at plaintiff's place of business (188a), Elite Deli, 2100 Richmond Road, Staten Island, is plaintiff's address as described in the policy, and the letter never was returned to Benway.

Thus, the same notice of cancellation effective August 18, 1971 was twice mailed and twice delivered prior to the fire.

It is respectfully submitted that defendant's proof of its office practice and procedure followed in the regular course of business together with the receipted certificate of mailing was sufficiently proper to invoke the presumption and to overcome plaintiff's denial of receipt of the second notice. As Judge Bartels said in his painstaking decision:

> "No link in the chain leading from the preparation of the forms to their delivery at a post office was ignored or neglected." (246a)*

* This conclusion refers to the first as well as the second notice. Since the second notice superseded the first, our emphasis here is on the second notice although as Judge Bartels held, the first notice was duly mailed.

POINT III

The five separate mailings in this case, two of which plaintiff "assumed" it received, represented cumulative evidence of actual notice prior to the fire.

In *Rose Inn Corp.* v. *National Union Insurance Company*, 133 Misc. 440, 444, rev. on other grounds, 229 A.D. 349, aff'd. 258 N.Y. 51, the court laid down the following rule:

> "The method of cancellation prescribed in the policy must be strictly followed. The insured must have actual notice of cancellation *or such a situation must be brought about as to put him on inquiry which, if made, would result in actual notice.*" [emphasis added.]

In 6a Appelman, Ins. Law & Prac., Sec. 4186, the author, noting the rule of law that actual notice is necessary, said:

> "A modification of this rule requires that notice be brought to the personal attention of the insured or that such a situation be brought about as to have put him on inquiry which, if made, would have resulted in actual notice."

We are not dealing in this case with a mailing of a single notice of cancellation. Here, there were five separate mailings to plaintiffs, namely, the two notices of cancellation, the broker's letter enclosing the second notice of cancellation, the letter demanding payment of the Final Balance of $254.34, and the so-called Final Notice. The first notice of cancellation was dated May 17, 1971; the so-called Final Notice was dated October 12, 1971. Thus, over a period of five months, plaintiff was literally inun-

dated with notices and letters. It would overtax the credulity of a person of ordinary judgment to believe that not one single piece of mail dealing with the cancellation was received by plaintiff at his place of business.

The fact is that mail was admittedly delivered to plaintiff's place of business on other occasions. DeFranco received Benway's announcement of February 2, 1971 (69a; 196a) and, concededly, Benway's letter of May 17, 1971 concerning the defaulted beer bond premium and application (Deft's. Exhibits O and P, pp. 39-40, EB), for he paid the premium and returned the signed application to Benway (215a). The testimony dealing with the default in paying the beer bond premium was accepted by the trial judge to show a pattern by plaintiff of non-payment and cancellation respecting other transactions (213a-216a).

On the central issue of whether plaintiff received the two notices of cancellation as well as the broker's letter containing a photostat copy of the second notice, DeFranco either could not recall or answered in the negative (52a; 65a; 67a) despite the overwhelming proof to the contrary.

However, with respect to the notice of Final Balance (Deft's. Exh. C, p. 17, EB), DeFranco answered:

> "*I assume I got this here* but I don't recall today" (54a); (emphasis supplied.)

and, with respect to the so-called Final Notice dated, October 12, 1971, (Deft's. Exhibit D, p. 18, EB), DeFranco testified:

> "I can't remember three years ago. It was addressed to me. *I assume I did*" (emphasis supplied) (60a-61a).

We submit that when DeFranco "assumed" that he received Deft's. Exhs. C and D, both of which referred to Hartford's demand for $254.34, "resulting from the cancellation of the policy" (sic), there was, finally, positive proof that prior to the fire plaintiff had actual notice of cancellation. In the face of this admission, plaintiff cannot dispute the cancellation or plead lack of knowledge or ignorance.

POINT IV

The judgment below should be affirmed with costs.

Respectfully submitted,

GREENHILL & SPEYER
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GEORGE I. JANOW
Of Counsel

SERVICE OF THREE (3) COPIES OF THE WITHIN

IS HEREBY ADMITTED

THIS 24 DAY OF Oct 1974

John Pizzo - per T. Abbey

Attorney(s) for Pet. app.